

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

ORIGINAL

74-1064
T-3055

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

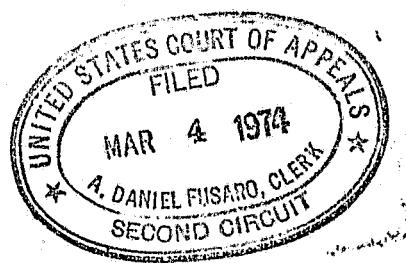
vs.

DONALD N. GERVASI,
Defendant-Appellant.

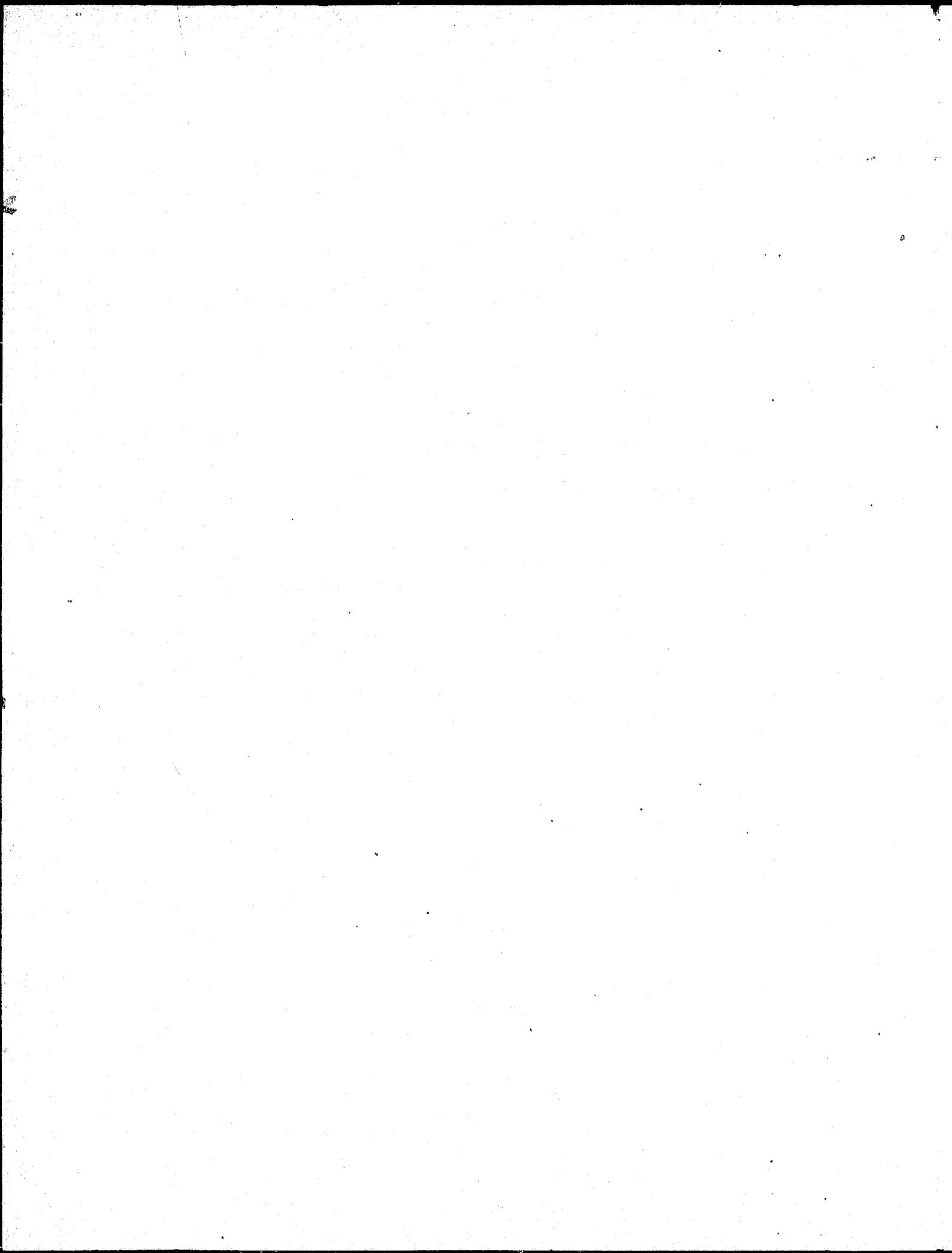
BRIEF FOR DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

Docket No. T-3055
Case No. 74-8006

DONALD N. GERVASI

Appellant

APPELLANT'S BRIEF

STATEMENT OF THE ISSUES

1. Did the Government negate the defense of entrapment beyond a reasonable doubt?
2. Did the seven-year sentence imposed on the defendant constitute cruel and unusual punishment under the Eighth Amendment?

STATEMENT OF THE CASE

The defendant was convicted of illegal possession of \$50,000 in counterfeit money on June 28, 1972, (Title 18, U.S. Code, Sec. 472). He was sentenced to serve seven years in prison.

The indictment contained four counts. The jury acquitted the defendant under counts 1, 2 and 3, and convicted him on count 4. Count 1 charged the sale of \$10,000 in counterfeit money on June 19, 1972, and Count 2 illegal possession of the same counterfeit money on June 19. Count 3 charged sale of the \$50,000 in counterfeit bills to a government agents on June 28, 1972.

On February 20, 1973, the court held a hearing on the defendant's motion to suppress evidence seized at the time of the defendant's arrest on June 28, 1972, without a search warrant, including the counterfeit money. On October 16, 1973, the court denied the motion to suppress.

At trial, the defendant's motion to dismiss the indictment, made at the end of the Government's case, was denied, (279)*. A defense motion to set aside the jury's verdict of conviction was also denied. In denying this motion, the court wrote an opinion, which is printed in our appendix.

A copy of the pre-sentence report is also printed in our appendix.

The defendant presented no evidence, and rested on

* denotes page number, record on appeal

the Government's case (278).

The defendant relied on the defense of entrapment. The court's original charge on entrapment, as well as it's further charge thereon, at the jury's request, are also printed in our appendix.

STATEMENT OF ESSENTIAL FACTS

In June, 1972, the defendant Gervasi was 29 years old, married and the father of two children (224-5). Since 1967, he had owned and operated Don's Arco Service Station in the Town of Clarence, Erie County, New York.

In June, 1972, one Donald Catalano was under indictment in the Northern District of New York for passing counterfeit money (73). Samuel Zona, a U.S. Secret Service Agent, made a "deal" with Catalano to have Catalano visit Gervasi's gas station "to try to set up a purchase of counterfeit money from Gervasi" (78). At the suppression hearing, Zona described Catalano as an "informer" (76). In return for his co-operation with the Government, Catalano eventually received a sentence of 18 months on his plea of guilty to the counterfeiting charge (87).

On June 16, 1972, Zona accompanied Catalano, in Catalano's car, to Gervasi's gas station. Zona admitted that this was a "ruse" to lure Gervasi into the sale of counterfeit money. Zona on June 16, ordered and paid for gasoline for Catalano's car.

On that occasion Zona saw Catalano and Gervasi talk privately, but was unable to hear the conversation. So far as the record discloses, this was the first contact between Catalano and Gervasi.

There was considerable further prosecution testimony concerning an alleged sale of counterfeit money on June 19, 1972, and a telephone call from agent Zona to Gervasi on June 26. However, the defendant was acquitted of the alleged sale and possession on June 19. We will therefore discuss only that portion of the testimony which is relevant to the defense of entrapment.

Both Zona and Guy Caputo, another Secret Service Agent, testified that on June 28, 1972, they visited Gervasi's gas station about 11:00 A.M. Zona introduced Caputo as "Louis, my cousin from New York" (56) who wanted to buy counterfeit money. A meeting was arranged for later that

morning at Regina's Pizzeria. When the three men met at Regina's, Gervasi suggested that they go to Ruby Red's Restaurant, where the three men had a drink. Zona and Caputo testified that at Ruby Red's, arrangements were made for delivery of \$50,000 in counterfeit money back at Gervasi's gas station (51, 146).

Gervasi returned to the gas station first. Shortly thereafter, Zona and Caputo drove up. Gervasi was standing near a green Chevrolet in the first bay of the gas station (59). Caputo asked "where's the money?" (127) Gervasi said "in the back seat" (156). After the door of the green Chevrolet was opened, the agents saw a paper bag, (Government's Exhibit 3) which contained counterfeit money in an amount later counted at \$49,920.00 (63).

Zona thereupon returned to the Agents' car, and took \$8,000.00 in genuine currency from the trunk. The genuine money, however, was not given to Gervasi. While Zona still held the money (64), and on a prearranged signal, other agents moved in, and arrested both Gervasi, Zona and Caputo. The agents had no search warrant or arrest warrant (120).

Zona and Caputo, as well as Gervasi, were searched and handcuffed (184). So far as Zona and Caputo were concerned this was "all an act" (140) and a "charade" (184).

Another Secret Service Agent, George Kontrabecki (198) also testified concerning observations he made at a distance of the events of June 28, as well as on earlier dates.

During jury selection, the United States Attorney indicated to the court and jury that Donald Catalano would be called as a Government witness (11). However, Catalano was neither called as a witness nor, in fact, was he even subpoenaed by the Government (276).

POINT ONE

THE GOVERNMENT FAILED TO NEGATE THE DEFENSE OF ENTRAPMENT

BEYOND A REASONABLE DOUBT

In Sherman v. United States 356 U.S. 369, 2 Law Ed. 2d 848, the court held that entrapment occurs "only when the criminal conduct was "the product of the creative activity" of law enforcement officials" (372). The court

quoted it's earlier decision in Sorrels v. United States,
287 U.S. 433, 77 Law Ed. 413.

In the present case the court charged the jury that the Government had the burden of negating beyond a reasonable doubt the defense of entrapment (342-3, 366).
The court charged: (343, 366)

"On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some officer or agent of the Government, then it is your duty to acquit him."

The undisputed testimony shows that on June 16, Agent Zona made a deal with Donald Catalano to "set up" a purchase of counterfeit money (78). There is no evidence as to the nature of the private conversation between Catalano and Gervasi at the gas station on June 16; nor is there any evidence that Gervasi already had "the readiness and willingness to break the law" (34?) which is essential to a holding that the "ruse" (94) used by Catalano and Zona was merely the providing by the Government Agents of "what appears to be a

favorable opportunity" (342), and which would put the case outside the rule of Sherman, and the law as here charged by the trial court.

There is no evidence that before June 16, "the defendant was ready and willing to commit crimes such as charged in these counts, that is to sell counterfeit money, whenever opportunity was afforded - - -" (342). By failing to call Catalano as a witness, the Government omitted an essential link in it's chain of proof that the defendant was in fact "already predisposed to commit the act - -" (Sherman, *supra*, 371).

The present record, absent the testimony of Catalano, can lead to no other conclusion but that Gervasi's criminal possession of the counterfeit money on June 28 was "the product of the creative activity of law enforcement officials" (Sherman, *supra*, 372).

POINT TWO

THE SEVEN-YEAR SENTENCE CONSTITUTED CRUEL AND UNUSUAL

PUNISHMENT UNDER THE EIGHTH AMENDMENT

The maximum penalty for violation of Title 18, Sec. 472, U.S. Code is 15 years imprisonment. Gervasi was

sentenced to serve seven years.

Conceding that ordinarily, the severity of the sentence, within the maximum limits is discretionary with the sentencing court, nevertheless, if this court deems the sentence cruel and unusual within the meaning of the Eighth Amendment, the judgment may be reversed or modified. If the sentence is so greatly disproportionate to the offense committed as to be arbitrary and shocking to the sense of justice, the court should reverse the sentence.

The jury acquitted the defendant of the first three counts of the indictment. He was convicted only of possession of the counterfeit money on June 28.

The defendant, then 29 years old, married and the father of two children, had operated the gas station for five years prior to his arrest. He had never previously been convicted of any crime. He had been honorably discharged from the Navy in 1962 (224-5).

Under all the circumstances, we submit that the sentence imposed was so greatly disproportionate to the single crime of possession of counterfeit money as to constitute cruel and unusual punishment, and require reversal.

CONCLUSION

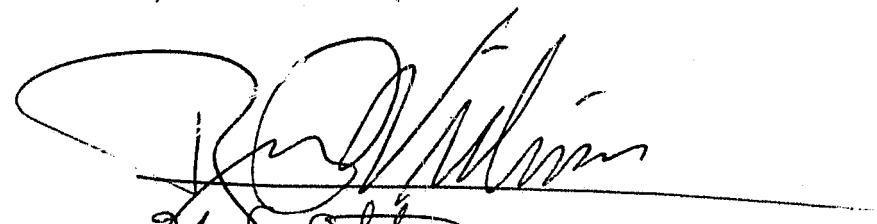
THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW
TRIAL ORDERED

Dated: Buffalo, N.Y.
February 26, 1974

Respectfully submitted,

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Service of these (3) Copies of within Brief
Admitted March 4 1974.


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